No. 09-35154

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION OF OREGON, et al.,

Plaintiffs-Appellants,

v.

JOHN KROGER, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Oregon
Hon. Michael W. Mosman
Case No. CV-08-501-MO

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES

Page

Statutes, Rules, and Regulations

TABLE OF AUTHORITIES

Page

Constitutional Provisions

Other Authorities

TABLE OF AUTHORITIES

Page

I. STATEMENT OF JURISDICTION

This case concerns the constitutionality, under the First, Fifth, and Fourteenth Amendments, of ORS 167.054 and ORS 167.057(1)(b)(A) (the "Statutes"). The district court had federal question jurisdiction over those claims under 28 U.S.C. § 1331.

In an Opinion and Order dated December 12, 2008 (ER 1), the district court denied appellants' motion for a permanent injunction and a declaration of unconstitutionality. In a judgment entered January 6, 2009 (ER 41), the district court dismissed appellants' complaint pursuant to that Opinion and Order. That judgment disposed of all parties' claims.

On February 4, 2009, appellants ACLU of Oregon ("ACLU"), Candace Morgan, Planned Parenthood of the Columbia Willamette ("PPCW"), and Cascade AIDS Project ("CAP") filed a notice of appeal from the judgment. (ER 37.) That notice of appeal was timely filed within 30 days of the entry of judgment, as Federal Rule of Appellate Procedure ("FRAP 4") (a)(1)(A) requires. The remaining plaintiffs filed a separate notice of appeal on February 3, 2009. (ER 39.) This appeal is also timely because it was filed within 14 days after that timely appeal, as FRAP 4(a)(3) requires. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in interpreting the Statutes? Specifically, did the trial court err by relying on legislative history to support an interpretation of the statutory exemption that contradicted its plain text?

2. Did the trial court err in determining that the Statutes were not substantially overbroad under the First Amendment?

3. Did the trial court err in determining that the Statutes were not vague pursuant to the First, Fourteenth, and Fifth Amendments?

4. Did the trial court err in summarily rejecting appellants' as-applied First Amendment challenges to the Statutes because plaintiffs were too numerous?

5. Did the trial court err in finding facts about appellants PPCW and CAP that were not supported by any evidence in the record?

III. STATEMENT OF THE CASE

A. Nature of the Case.

ORS 167.054 ("Section 054") criminalizes the delivery of certain "sexually explicit" materials, as defined in the statute, to preteens. A companion statute, ORS 167.057(1)(b)(A) ("Section 057"), criminalizes the delivery of certain materials depicting "sexual conduct" to minors for the purpose of "[a]rousing or satisfying the sexual desires of the person or the minor."

In the district court, appellants challenged the Statutes facially and as applied under the First, Fifth, and Fourteenth Amendments. Appellants also alleged that the Statutes were unconstitutionally vague. The district court misinterpreted the Statutes and erroneously rejected those challenges.

B. Course of the Proceedings Below.

Appellants filed their complaint on April 25, 2008 (ER 307) and an amended complaint on May 14, 2008. (ER 177.) On April 24, 2008, appellants also filed a motion for a preliminary injunction (ER 304), which was denied after a hearing. (CR 34.) On July 31, 2008, appellants filed a motion for a permanent injunction and a declaration of unconstitutionality. (ER 121.)

C. Disposition Below.

The district court denied appellants' motion for a preliminary injunction and a declaration of unconstitutionality in the Opinion and Order dated December 12, 2008. (ER 1.) That Opinion and Order resolved all of appellants' claims.

IV. STATEMENT OF FACTS

A. The Statutes.

The Statutes, ORS 167.054 and ORS 167.057(1)(b)(A) , are state laws criminalizing the provision to minors and preteens of certain material deemed to be "sexually explicit" or to depict or describe "sexual conduct." The Statutes are

reproduced in full in an addendum to this brief, but appellants describe the relevant portions below.

1. Section 054: Furnishing Sexually Explicit Material.

Section 054 provides that a person commits a crime "if the person intentionally furnishes a child [under age 13], or intentionally permits a child to view, sexually explicit material and the person knows that the material is sexually explicit material."[1]

a. Exceptions to Section 054.

A person may not be prosecuted under Section 054 if, in relevant part, (1) the person is an employee of a medical treatment provider, acting within the scope of his or her regular employment or (2) the sexually explicit portions of the material furnished form merely "an incidental part of an otherwise nonoffending whole *and* serve some purpose other than titillation." (Emphasis added.) To avoid liability, both parts of the exemption must be met.

[1] Material is "sexually explicit" if it contains "visual images of: (a) Human masturbation of sexual intercourse; (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; or (c) Penetration of the vagina or rectum by any object other than as part of a personal hygiene practice." ORS 167.051(5).

b. Affirmative Defenses Under Section 054.

Section 054 provides three affirmative defenses to prosecution: (1) that the material was provided solely for the purpose of sex education, art education, or psychological treatment *and* was furnished or permitted by the child's parent or legal guardian, an educator or treatment provider, or another person acting on behalf of such party; (2) that the defendant reasonably believed the person at issue was not a child; or (3) that the parties are within three years of age.

2. Section 057: Furnishing for the Purpose of Sexual Arousal.

Section 057 provides that it is a crime for a person to furnish or use with a minor (a person under 18 years old) a visual representation or explicit verbal description or narrative account of sexual conduct for the purpose of arousing or satisfying the sexual desires of the person or the minor.[2]

a. Exceptions Under Section 057.

Section 057 provides only one exception to liability: A person is not subject to prosecution if the material furnished forms merely "an incidental part of an

[2] "Sexual conduct" is "(a) Human masturbation or sexual intercourse; (b) Genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex or between humans and animals; (c) Penetration of the vagina or rectum by any object other than as part of a medical diagnosis or as part of a personal hygiene practice; or (d) Touching of the genitals, pubic areas or buttocks of the human male or female or the breasts of the human female." ORS 167.051(4).

otherwise nonoffending whole and serves some purpose other than titillation." That second exception is materially identical to the exception in Section 054.

b. Affirmative Defenses Under Section 057.

Section 057 has three affirmative defenses: (1) "[t]hat the representation, description or account was furnished or used for the purpose of psychological or medical treatment and was furnished by a treatment provider or by another person acting on behalf of the treatment provider"; (2) that the defendant reasonably believed the person at issue was not a minor; or (3) that the parties are within three years of age. The affirmative defenses to liability under Section 057, unlike under Section 054, offer no defense for material used for educational purposes and do not protect parents or educators.

3. Differences Between Section 054 and Section 057.

The primary differences between the two sections are as follows.

Section 054 provides that

- The criminalized material may be visual (pictures) only.
- The material must be furnished to a preteen.
- The material need not be furnished for any particular purpose.
- Medical treatment providers are exempt.
- There is an affirmative defense for sex education when ratified by a parent, guardian, educator, or treatment provider.

Section 057 provides that

- The criminalized material may include pictures or text.
- The material must be furnished to a minor under 18.
- The material must be furnished for the purpose of sexual arousal or satisfaction, of either the minor or the defendant.
- There is no exception for medical treatment providers.
- There is no affirmative defense for sex education.

Both sections contain an exemption if the material furnished is "an incidental part of an otherwise nonoffending whole and serves some purpose other than titillation."

B. The Parties.

All appellants are organizations or individuals who provide sexually explicit materials, and materials describing or depicting sexual conduct, to minors and preteens. They all fear prosecution under one or both of the Statutes because of those activities.

Candace Morgan. Ms. Morgan is a resident of Multnomah County, Oregon, a librarian, and a provider of regular care for her grandson.[3] (Declaration

[3] Ms. Morgan's grandson is less than 13 years old. He was seven when she executed her declaration in this case on April 22, 2008.

of Candace Morgan, ER 236.) While caring for her grandson, she regularly takes him to the library and to bookstores, where she helps him select books to purchase. (*Id.*) Among the books that Ms. Morgan has considered giving her grandson are *It's So Amazing* and *It's Perfectly Normal* by Robie H. Harris. (*Id.*, ER 238.) If the Statutes are not overturned, Ms. Morgan will either risk criminal liability or be forced to self-censor the materials she provides her grandson.

CAP. CAP is an Oregon nonprofit organization; its mission includes, among other things, preventing new HIV infections. (Declaration of Rebecca Harmon, ER 246.) CAP's Teen2Teen program trains teen volunteers aged 15 to 19 as peer educators in HIV/AIDS and sexuality education. As part of its sexuality education efforts, CAP distributes materials including descriptions or depictions of sexual behavior. (*Id.*, ER 247.) CAP does not know (and could not possibly know) the precise ages of peer group minors who may receive materials from CAP's peer educators. (*Id.*, ER 250.) Among other materials, CAP distributes peer education "zines" which describe and/or depict sexual behavior. (*Id.* at Ex. A.)

PPCW. PPCW is the largest nonprofit family planning and reproductive rights organization in Oregon. (Declaration of David Greenberg, ER 241.) For nearly 50 years, PPCW has been committed to, among other things, providing age-appropriate sexuality education to raise awareness of sexual and reproductive

health issues and to reduce unintended pregnancies and births, especially among young people. (*Id.*) PPCW's trained educators provide sexuality education programs to youth. (*Id.*) Its programs include teen peer education programs and educational presentations to schools and community groups. (*Id.*) PPCW's youth programs have various target audiences, some as young as 10 years old. (*Id.*) As part of those programs, PPCW distributes materials including descriptions or depictions of sexual behavior. (*Id.*, ER 242.) Materials used by PPCW include *It's Perfectly Normal* by Robie H. Harris, and *Where Did I Come From?* by Peter Mayle, among other materials.[4] (*Id.* at Ex. A.)

ACLU. The ACLU is an Oregon nonprofit, nonpartisan advocacy organization with over 17,000 members, all of whom live or work in Oregon. (Declaration of David Fidanque, ER 272.) The ACLU lobbies to prevent the passage of laws that would undermine civil liberties and civil rights. (*Id.*) As part of its outreach efforts, the ACLU's staff and volunteer members do educational outreach to the public regarding books and other material that have been banned, challenged, or otherwise subjected to censorship or censorship attempts. (*Id.*, ER 274-275.) Many of those materials have been subjected to challenge because they

[4] Copies of both of those books were submitted to the district court as exhibits to the Supplemental Declaration of Christopher Finan (ER 63).

contain discussion or depictions of sexual activity. (*Id.* at 275.)[5] During such outreach activities, the ACLU displays copies of banned and challenged books and allows members of the public, including minors, to review the material. (*Id.*) The ACLU fears that its staff and volunteers will be prosecuted under the Statutes for those activities. If the Statutes remain in force, those individuals will be forced to risk criminal liability or restrict their activities to avoid prosecution.

V. SUMMARY OF ARGUMENT

This case is about two Statutes that, on their face, plainly allow Oregon district attorneys to prosecute adults for the constitutionally protected activity of providing minors with books and pamphlets that are not obscene and that have serious value. Those materials include comic books and novels that have serious artistic and literary value as well as pamphlets and educational materials that provide basic scientific and medical information necessary to educate minors about

[5] As appellants noted in their memorandum in support of their motion for a permanent injunction and declaration of unconstitutionality (CR 37), books that have been subjected to censorship or censorship attempts are listed with the Oregon Intellectual Freedom Clearinghouse, which is affiliated with Library Development Services at the Oregon State Library. It can be found at http://oregon.gov/OSL/LD/intellectual.shtml. The ACLU maintains that information online, together with additional information from the American Library Association, in "Challenged Materials in Oregon." That document is currently available at http://www.aclu-or.org/sites/default/files/OR_challenges_1979_2008__9.14.08_.xls.

sexuality. Under the Supreme Court's opinions in *Miller* and *Ginsberg*, the Statutes are baldly unconstitutional.

The district court opinion engaged in every conceivable kind of logical gymnastics to avoid the Statutes' plain unconstitutionality.

First, the district court misinterpreted the Statutes to mean something more innocuous than what their text plainly states. In making that decision, the district court relied on an understanding of the Oregon legislature's intent that the legislative history it cited does not support.

Next, the district court erred when it determined that the Statutes are not substantially overbroad. Properly construed, the Statutes are unconstitutionally overbroad because they reach a vast amount of ordinary and constitutionally protected speech.

The district court erred when it determined the Statutes are not unconstitutionally vague. The Statutes are vague, particularly the exemption for materials that are "merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." That exemption is so nonspecific as to create a "free pass" for any prosecutor to criminalize the furnishing of certain materials simply because he or she finds them distasteful.

The district court then rejected appellants' as-applied challenge to the Statutes without any discussion on the merits, citing only the vast number of

plaintiffs and the different types of speech in which they engage. Had it considered the merits, the district court should have determined that the Statutes are unconstitutional as applied to each appellant.

Finally, the district court justified its opinion as to appellants CAP and PPCW by drawing factual conclusions that were not supported by any evidence in the record.

Below, the state contended that the purpose of the Statutes is to protect minors from sexual abuse. Without question, that is a laudable goal. However, that is not sufficient reason to uphold a law that also criminalizes large swaths of constitutionally protected activity. The Statutes are far-reaching, and the state's attempts to find some legal basis in legislative history for saving them (many of which were adopted by the trial court) are complex. Of necessity, therefore, appellants must engage in complex statutory analysis to show why the state and the district court are wrong. In reality, though, this case is very simple. The plain text of the Statutes allows prosecutors to charge appellants and others for simply disseminating constitutionally protected materials that have serious value. That outcome is repugnant to the First Amendment and the Supreme Court's opinions in *Miller* and *Ginsberg*. This Court should strike down the Statutes as unconstitutional.

VI. ARGUMENT

A. Standard of Review.

Review of a district court decision granting or denying declaratory relief is *de novo*. *See Wagner v. Prof'l Eng'rs in Cal. Govt.*, 354 F.3d 1036, 1040 (9th Cir. 2004); *Ablang v. Reno*, 52 F.3d 801, 803 (9th Cir. 1995). A ruling regarding a permanent injunction is reviewed for an abuse of discretion. *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir.), *cert. denied*, 540 U.S. 811 (2003). Any questions underlying the ultimate question of whether to grant a permanent injunction are reviewed according to the appropriate standard: The determination of underlying facts is reviewed for clear error, but a conclusion of law is reviewed de novo. *Id.*

B. The District Court Misinterpreted the Statutes.

Appellants challenged the Statutes because their plain text criminalizes a wealth of material that is constitutionally protected. Rather than responding that the criminalization of that material is warranted, as in the typical free speech case, the state argued that the Statutes mean something other than what their plain language states. Basing its analysis on inapplicable case law and ambiguous legislative history, the district court rejected the plain text of the Statutes and (in defiance of the applicable rules of statutory interpretation) held that the Statutes mean something else entirely. As described below, that was error.

1. Preservation.

Appellants discussed the appropriate interpretation of the Statutes in light of Oregon case law and rules of interpretation in their briefing in support of their motion for a permanent injunction and declaration of unconstitutionality. (CR 37 (opening brief), CR 45 (reply).) Appellants also discussed the interpretation of the statutory exception at length in oral argument. (CR 57.)

2. Oregon Rules of Statutory Interpretation Emphasize the Primacy of Text.

Oregon courts require a specific method for analyzing the meaning of statutes. The first step is to review the text and context of the statutory provision at issue, including other statutes and relevant case law interpreting the statute. *PGE v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1146 (Or 1993). In an opinion issued since the district court's opinion in this case, the Oregon Supreme Court reaffirmed that *the text of the statute is the most important consideration in determining a statute's meaning*:

> [T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes. Only the text of a statute receives the consideration and approval of a majority of the members of the legislature, as required to have the effect of law. The formal requirements of lawmaking produce the best source from which to discern the legislature's intent, for it is not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law[.]

State v. Gaines, 206 P.3d 1042, 1050 (Or. 2009) (internal quotation marks and citations omitted). After considering the text and context of the statute, a court may consider legislative history to determine if there is any "latent ambiguity" in the statute, but a "party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it." *Id.* at 1051.

3. The Statutory Exception Plainly Has Two Parts.

As described above, Section 054 and Section 057 share a materially identical exemption. A person is not subject to prosecution under the Statutes when the material provided forms "merely an incidental part of an otherwise nonoffending whole *and* serve[s] some purpose other than titillation." ORS 167.054(2)(b), 167.057(2) (emphasis added) (the "Exemption"). By its plain terms, the Exemption contains two separate parts. In order to qualify for the Exemption, the material must (1) form an incidental part of an otherwise nonoffending whole *and* (2) serve some purpose other than titillation.[6]

[6] As appellants assert in their vagueness challenge, those two parts are so vague as to allow for unbridled discretion on the part of a law enforcement agency. Nonetheless, it is at least clear that there are two parts to the exception.

4. The District Court Ignored the Disjunctive Nature of the Exemption and Improperly Used Legislative History to Implement a New Exemption Contrary to Statutory Text.

The district court began by analyzing the text and context of the Statutes. In so doing, it considered an Oregon Court of Appeals case, *State v. Maynard*, 5 P.3d 1142 (Or. Ct. App. 2000) (en banc). *Maynard* interpreted an earlier statute with an exception similar to the Exemption. The Court could have relied on *Maynard* if it had interpreted the Exemption in a way that was helpful in this case.

In *Maynard*, the Oregon Court of Appeals analyzed that exception under Article I, section 8, of the Oregon Constitution (Oregon's free speech provision). The primary question in *Maynard* was whether the exception operated to protect a defendant who did not primarily intend to titillate *himself*, or whether it only protected defendants who did not primarily intend to titillate a *recipient* of the materials.[7] The *Maynard* court noted that the purpose of the overall statute containing the exception was "to protect children from the effects of hardcore

[7] Oregon free speech analysis is a very different exercise from analysis for compliance with the free speech clause of the First Amendment. Oregon courts consider, first, whether the restriction is directed at speech or at the harm resulting from speech. Restrictions directed at speech are analyzed for overbreadth. Finally, the court asks whether the restriction falls within an "historical exception" that the framers of the Oregon constitution would have recognized. *State v. Robertson*, 649 P.2d 569 (Or. 1982). The *Maynard* court was attempting to determine whether the statute in question was directed at speech or the harm resulting from it. *Maynard*, 5 P.3d at 1146.

pornography" and that, in light of that purpose, it would "make no sense to shield a defendant from criminal liability merely because that defendant did not primarily intend to titillate him or herself by engaging in the prohibited conduct. Thus, the context of ORS 167.085(3) plainly shows that the defense applies to those materials not primarily intended to titillate the victim." *Id.* at 1147.

In this case, the state asserted to the district court that this brief portion of *Maynard* had definitively interpreted the phrase "merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation" to mean that the Exemption applies if the defendant did not "primarily intend to titillate" the recipient of the materials.

Appellants disagreed. The *Maynard* court was addressing a narrow question for purposes of Oregon constitutional scrutiny (whose titillation was at issue?), and its opinion did not purport to provide a holistic interpretation of the exception. Further, the interpretation the state advanced was improper because it rendered Section 057 redundant. Because Section 057 already includes as an element that the material must be furnished for the purpose of sexually arousing the recipient, it would make no sense to interpret the Exemption to mean exactly the same thing.

Following the steps of Oregon statutory interpretation, the district court correctly determined that the Exemption is unclear and that *Maynard* did not provide a definitive interpretation. It then turned to the legislative history to see

whether it would clarify the Exemption's meaning. The court considered the following evidence:

- Michael Slauson of the Oregon Department of Justice testified before a legislative committee that the Statutes are an attempt to comply with "the guidance that was given to us by the court" in *Maynard*.
- Marion Bureta, a district attorney, testified that the Statutes are needed to prevent "grooming" of children for sexual abuse.
- Senator Kate Brown, one of the proponents of the bill that became the Statutes, testified that the goal of the bill was to prevent child sexual abuse and predatory child exploitation.
- Representative Andy Olson, another proponent, testified that the Statutes are aimed at "hardcore" pornography.

(Opinion and Order, ER 22-23.) Based on that evidence, the district court determined that the legislature was aware of *Maynard* and "wished to follow its guidance"—and that, therefore, the court should use "the *Maynard* definition of the defense." (*Id.*, ER 23.)

That decision was an illogical and internally inconsistent leap that is unsupported by either law or fact. The district court had already concluded (correctly) that *Maynard* did not provide enough guidance to ascertain the meaning of the Exemption. Nothing in the legislative history provides any further certainty.

The history showed only that the legislature intended to follow *Maynard*—but it never indicated what anyone who voted for the bill thought that *Maynard* meant. At most, the legislature stated its intent to enact a bill that would pass muster under the Oregon Constitution[8]—a worthy goal, but not a statement that provides a substantive interpretation of the Exemption or has any relationship to whether the Statutes meet the standards of the *federal* constitution.

In addition, as described above, nothing in *Maynard* itself provides any "definition of the defense." *Maynard* simply states the very basic proposition that the defense does not exempt defendants who primarily intend to titillate themselves.

Most importantly, the court's interpretation of the Statutes violates applicable rules of statutory construction. Nothing in the legislative history—or in *Maynard*—supports the district court's decision to interpret the Exemption, which has two distinct disjunctive requirements,[9] as having only a single requirement.[10]

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[8] It would be a poor precedent to allow a statute to survive constitutional scrutiny simply because the legislature wanted the statute to be constitutional.

[9] To recap, those requirements are that the material must (1) form an incidental part of an otherwise nonoffending whole *and* (2) serve some purpose other than titillation.

[10] The requirement, that is, that the defendant did not "primarily intend to titillate" the victim.

As written, a defendant must meet both parts of the Exemption in order to escape liability. As interpreted, a defendant must meet only one part. Thus, the district court, with no basis in text, context, or legislative history, rewrote the plain text of the Statutes.[11] That is exactly what Oregon rules of statutory construction say a court must not do. Further, the district court's construction violates the rule that "where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." *PGE*, 859 P.2d at 1146. By determining that the Exemption means only that the defendant did not "primarily intend" to arouse the recipient, the court enacted an interpretation of the Exemption that was virtually coextensive with Section 057's provision that the defendant must furnish material in order to arouse. In the absence of evidence to support an alternative interpretation and justify deviating from the plain language of the Statutes, the district court should have interpreted the Statutes as written. And as written (as described below) they are vague and overbroad.

[11] In fact, the district court noted that fact during the hearing on appellants' ultimate motion, noting, "I think we have a pretty clear idea of what the statute covers if we read it as written and even in the context of related provisions. The State suggests a substantially different meaning than would jump out at you from the text, based on *Maynard*." (ER 45-46.)

C. The District Court Erred by Failing to Hold the Statutes Substantially Overbroad.

Properly construed, the Statutes reach innumerable activities that are protected by the First Amendment. They should be invalidated their face as substantially overbroad.

1. Preservation.

Appellants argued that the Statutes are substantially overbroad in their Complaint (ER 307, 177), in their briefing in support of their motion for a permanent injunction and declaration of unconstitutionality (CR 37 (opening brief), CR 45 (reply)), and at oral argument (CR 46).

2. The Statutes Criminalize a Substantial Amount of Activity Protected by the First Amendment.

As the district court noted, a statute being challenged on its face on First Amendment grounds is subject to an overbreadth analysis. That analysis involves determining what the statute means, determining whether it criminalizes a substantial amount of protected expressive activity, and, if it does, asking whether the statute is "readily susceptible" to a limiting construction. (ER 13 (citing case law).)

Properly construed, the Statutes not only criminalize the constitutionally protected activities of appellants, as described above in Part VI.C, but they also

criminalize innumerable other constitutionally protected acts.[12] Section 054 prevents furnishing to any preteen any visual material deemed "sexually explicit" if the defendant knows the material was explicit and the two-part Exemption does not apply. It does not contain an exception for parents, unless parents are providing the material for specific purposes. Section 057 prevents furnishing to any minor any material that describes or depicts sexual conduct if the defendant knows the minor would become sexually aroused or would use the material to satisfy his or her sexual desire. Given that most sexual education material and many literary works of serious value meet that definition, the breadth and depth of the restricted constitutional activity is far-reaching.

The broad scope of the Statutes is even more egregious when viewed in light of the First Amendment's requirement that the state must demonstrate that the Statutes use the least restrictive means to accomplish the statutory objective. If the goal of the Statutes are to protect minors from "grooming," then the state already has a powerful tool in ORS 167.057(1)(b)(B), which prohibits furnishing a minor with depictions or narrative descriptions of sexual conduct for the purpose of

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[12] In fact, the district court noted to counsel at oral argument that "Under your reading of the statute . . . you may be able to show a substantial number of books that are punishable under the statute but protected under *Miller/Ginsberg*." (ER 56-57.)

"inducing the minor to engage in sexual conduct."[13] That provision, unlike the Statutes, which applies to many constitutionally protected activities, is specifically tailored to the statutory purpose.

D. The District Court Erred by Failing to Hold the Statutes Unconstitutionally Vague.

1. Preservation.

Appellants raised their vagueness challenge and explained the basis for it in their Complaint (ER 307, 177) and in their briefing in support of their motion for a permanent injunction and declaration of unconstitutionality. (CR 37 (opening brief), CR 45 (reply).)

2. Vagueness Standards.

As the Supreme Court stated in *Grayned v. City of Rockford*, a law is void for vagueness under the Due Process Clause of the Fifth Amendment if its prohibitions are not clearly defined. 408 U.S. 104, 108 (1972). "[W]here a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). Statutes that regulate any speech protected under the First Amendment must operate with "narrow specificity." *Foti v. City of Menlo Park*, 146 F.3d 629, 638-39 (1998) (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). That particular stringency is necessary (1) because citizens

[13] Appellants did not challenge that provision.

should not be punished for behavior that they could not have known was illegal, (2) to avoid "arbitrary and discriminatory" enforcement by state officers, and (3) to avoid the potential chilling effect on speech that is covered by the First Amendment. *Id.* at 638. The Statutes implicate all of those concerns.

Vagueness is intolerable in a statute affecting First Amendment freedoms:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.*

Button, 371 U.S. at 432-33 (1963) (emphasis added; footnote and citation omitted); *see also Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

Below, the state argued that appellants could not maintain both an overbreadth challenge and a vagueness challenge. The state reasoned that the two arguments were contradictory because appellants could not consistently argue that the Statutes applies to particular activities *and* that appellants did not know which activities the Statutes prohibit. That is a false description of appellants' vagueness challenge. Appellants are not challenging the Statutes because they cannot tell

what they allow a prosecutor to pursue. Rather, the Statutes are unconstitutionally vague because they do not provide a clear enough road map of what a prosecutor *may not* pursue. That free-ranging discretion is itself a constitutional violation. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance was void for vagueness because it encouraged arbitrary and erratic arrests and convictions, criminalized activities that were normally innocent, and placed almost unfettered discretion in hands of law enforcement).

3. The Exemption Is Vague.

Even if the reach of the Statutes are clear and obvious in some cases (for example, the Statutes would obviously apply to the "grooming" activity they are designed to prevent) hundreds of transactions occur every day in Oregon that could be criminalized under the plain language of the Statutes. Only the whim of particular law enforcement officers stands between plaintiffs and criminal prosecution. For appellants, fear of publicity as to a charge of "luring" is almost as chilling as a conviction.

Most of the potential ambiguity in the Statutes surrounds whether speech is "merely an incidental part of a nonoffending whole." "Incidental" means "subordinate, nonessential, or attendant in position or significance." *Webster's Third New International Dictionary* 1142 (2002). What is subordinate, nonessential or less significant is completely in the eye of the beholder

(particularly as the Statutes contain no reference to contemporary community standards). What one citizen (or police officer or district attorney) considers "incidental" to a work, another might consider the most important point. That judgment is especially likely to vary if the beholder finds the speech at issue to be offensive. Avoiding such arbitrary and discriminatory enforcement is at the very heart of the issues a court should consider when determining whether a statute is vague.

Whether material "serves some purpose other than titillation" also differs depending on who is making the decision. To state the phrase is to reveal how little meaning lies behind it. What if the material is provided for more than one purpose? How much of the purpose (even a *general* approximated amount) must be unrelated to titillation? Close to all? Half? How is a potential defendant to know whether the minor will be titillated, since what sexually arouses one minor may not sexually arouse another? At the end of the inquiry, the phrase "some purpose other than titillation" could be bent to the judgment of the prosecutor, just as the "incidental part" requirement.[14]

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[14] Nor is it clear whether the Statutes are talking about the purpose of the material or of the provider. If it is of the provider, then Section 054 is surplusage since it is subsumed in Section 057. If it is of the material, then it remains unclear how is one to determine the purpose of materials.

In fact, the district court observed itself that there are a number of points where the Exemption is unclear:

> The scope of this exception is not readily ascertainable from the text alone. First, the relative size or importance of an incidental part and the existence of a non-offending whole are difficult to determine without more information. Second, the identity of the person whose "purpose" is relevant to the exception is unclear. Third, the phrase "some purpose other than" is ambiguous, it is unclear whether the statutes require that the only purpose be something other than titillation, or whether titillation may be one of several purposes.

(ER 20.)

Despite that observation, the district court determined that the Statutes are not unconstitutionally vague because the vague terms in the Exemption are "as clear as all the statutes incorporating 'prurient interest' and 'patently offensive' from the *Miller* obscenity test." (ER 36.) What the district court overlooked is that there have been numerous decisions from courts of all levels interpreting the terms of the *Miller* test. The meaning of these terms remains cloudy and pliable. Appellants respectfully submit that, unless this Court can provide an interpretation that will free them (and the rest of the public) from uncertainty as to whether a

given action will subject them to prosecution, the Statutes should be struck down as unconstitutionally vague.[15]

E. The District Court Erred in Summarily Rejecting Appellants' As-Applied Challenges to the Statutes.

In their complaint, appellants raised both as-applied and facial challenges to the Statutes. (ER 307, 177.) The district court rejected appellants' as-applied challenge entirely with no discussion on the merits. As described below, the district court erred in that determination. Appellants properly raised a meritorious as-applied challenge to the Statutes.

1. Preservation.

Appellants raised their as-applied challenge and explained the basis for it in their Complaint (ER 1, 140) and in their briefing in support of their motion for a permanent injunction and declaration of unconstitutionality. (CR 37 (opening brief), CR 45 (reply).)

2. The District Court Improperly Rejected Appellants' As-Applied Challenge Without Consideration on the Merits.

The district court declined to even consider appellants' as-applied claim on the merits. It based that holding entirely on dicta in a Second Circuit case,

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[15] As appellants argued below, they are not aware of any limiting construction that would resolve the Statutes' vagueness or their unconstitutional overbreadth.

American Booksellers Foundation v. Dean, 342 F.3d 96, 105 (2d Cir. 2003). The district court misconstrued *Dean*, which does not provide authority for the refusal to consider appellants' claim.

In *Dean*, the Second Circuit upheld a First Amendment challenge by operators of several internet websites against a Vermont statute that prohibited the transfer of certain sexually explicit material to minors. The court then considered whether to modify the scope of an injunction against enforcement, and it noted that the scope of the injunction should be tailored to protecting the plaintiffs themselves. It distinguished another case, *Reno v. ACLU*, 521 U.S. 844 (1997), in which the Supreme Court had enjoined the statute at issue entirely.

In *Reno*, the Court considered a First Amendment challenge to the Communications Decency Act ("CDA"). After finding that the CDA was unconstitutionally overbroad, the Court considered the remedy. It invalidated the CDA completely, despite a severability clause in the statute. The Court explained that the statute itself foreclosed an as-applied challenge. It also noted that it would not be practical to fashion a limiting construction given the "vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute." *Id*. at 883.

Neither *Dean* nor *Reno* provide any basis for a district court to ignore an as-applied challenge to a statute without even discussing the merits. In *Dean*, the

court addressed and upheld an as-applied challenge. In *Reno*, the statute itself prohibited any as-applied challenge. Even more critically, the relevant portions of both *Dean* and *Reno* concerned a court's consideration of the *scope of a remedy*—not whether a violation existed at all. When considering the scope of an injunction, or whether a limiting instruction may be imposed, a court might conceivably consider the kinds of practical concerns the district court cited here. *See, e.g.*, *Virginia v. Am. Booksellers' Ass'n, Inc.*, 484 U.S. 383, 397 (1988) (court must determine whether statute is "readily susceptible" to limiting construction); *cf., e.g., N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (*quoting eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)) (permanent injunction is appropriate to extent balance of hardships and public interest requires it). The district court provided no authority—and appellants assert there is none—allowing it to ignore appellants' as-applied challenge without considering the merits simply because of "the variety of plaintiffs and the different types of speech in which they engage." (ER 10.) It was the district court's duty to consider each plaintiff individually and determine whether each plaintiff had stated a meritorious claim that the Statutes are unconstitutional as applied to plaintiffs.

3. The Statutes Unconstitutionally Restrict the Activities of Each of the Appellants.

As described below, had the district court considered the merits of appellants' as-applied claims, it should have ruled in their favor.

a. The First Amendment Protects the Provision of Material to Minors and Preteens Unless It Meets the *Miller/Ginsberg* test.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." That amendment has been applied to the states through the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). When evaluating whether a state may suppress First Amendment-protected materials, courts apply "strict scrutiny," which means the state's restriction must be narrowly tailored to achieve a compelling interest. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (describing principle).

In *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968), the Supreme Court determined that the state's interest in the well-being of youth, and the provision of support for parents' authority to direct the rearing of their own children in their own household, constituted a compelling interest that allowed the restriction of some materials not deemed obscene. *See also Reno*, 521 U.S. at 865. That interest, however, does not justify an unnecessarily broad suppression of speech addressed to adults. *Id.* at 875. It is the state's burden to show that laws that

suppress speech are narrowly tailored and that a less restrictive provision would not accomplish the same goals as the law being challenged. *Id.* at 879.

Taking together the holdings in *Ginsberg* and in *Miller v. California*, 413 U.S. 15 (1973), the U.S. Supreme Court created a test for determining whether material that is First Amendment-protected as to adults is unprotected as to minors. Although the *Miller/Ginsberg* test is generally referred to as a three-part test, there are actually five substantive components. For a restriction on access by minors not to violate the First Amendment, material must (1) be taken as a whole, (2) appeal to the prurient interest of minors,[16] (3) contain content that is patently offensive to the adult community as a whole as to what is suitable for minors, (4) apply contemporary community standards, and (5) lack serious value for minors. As demonstrated below, neither Section 054 nor Section 057 includes all of these requirements; therefore they are unconstitutional under the First Amendment.

Only material that meets this test can be barred from distribution to minors and only if such prohibition does not unduly infringe on adult access. *Cf. ACLU v. Gonzales*, 478 F. Supp. 2d 775, 809 (E.D. Pa. 2007).

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[16] Material is not "prurient" if it simply arouses a normal sexual response. *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989).

b. The First Amendment Protects Materials Distributed by Appellants.

Each of the appellants raised specific examples of material it distributes that is protected by the First Amendment as interpreted in *Miller* and *Ginsberg*.

Candace Morgan. Ms. Morgan would like to be able to give her grandson a copy of Robie H. Harris' *It's Perfectly Normal*, among other books.[17] That book is unquestionably protected by the First Amendment as to minors. It is not prurient; it clearly explains sexual behavior and anatomy in straightforward terms that the adult community would find appropriate for minors and preteens. It has serious literary, artistic, and scientific value.[18] [19]

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[17] A copy of that book was submitted to the district court as an exhibit to the Supplemental Affidavit of Christopher Finan. (ER 63.) Excerpts are provided in appellants' Excerpt of Record at ER 100-104. However, with this and all other book excerpts appellants have provided, appellants urge the Court to review the work in its entirety, given the *Miller* / *Ginsberg* requirement that the work be evaluated as a whole.

[18] In fact, the district court admitted that it believed *Where Did I Come From?* by Peter Mayle, a book similar to *It's Perfectly Normal*, is constitutionally protected under *Miller/Ginsberg*. (ER 56.)

[19] Indeed, appellants below introduced evidence in the form of declarations from a sex educator, a psychologist, and a medical doctor explaining exactly why information about sexuality, in the form of traditional sex education materials or otherwise, is not only valuable, but is crucially important for the healthy development of preteens and minors. That evidence was uncontradicted below. (CR 38 (Declaration of Dr. Richard S. Colman), 39 (Declaration of Camelia Hison), 40 (Declaration of Dr. Mark Nichols).)

CAP. CAP's staff and teen volunteers distribute, among other materials, independently produced "zines" like the one submitted to the district court. (Harmon Decl., Ex. A (ER 246).) Those 'zines are also protected by the First Amendment as to minors. Like *It's Perfectly Normal*, the 'zines are straightforward and nonprurient; they explain sexual behavior in terms appropriate for minors and preteens.

PPCW. PPCW's educators and volunteers use a number of sex education materials, including *It's Perfectly Normal* and *Where Did I Come From?*[20] Those materials are protected for the same reasons as the materials described above.

ACLU. ACLU's staff and volunteers regularly display copies of books banned in Oregon to the public (including minors) for educational purposes. As appellants described below in their Memorandum of Law in Support of Request for Declaration of Unconstitutionality and Permanent Injunction, books banned in Oregon include *Mommy Laid an Egg, Or Where Do Babies Come From?* by Babette Cole, *Brighton Beach Memoirs* by Neil Simon, *The Color Purple* by Alice

[20] *Where Did I Come From?* was submitted in its entirety to the district court as an exhibit to the Supplemental Declaration of Christopher Finan. (ER 63.) Appellants have provided excerpts at ER 105-109.

Walker, *Ricochet River* by Robin Cody, and *Forever* by Judy Blume.[21] Appellants submit that those works are entitled to constitutional protection under the *Miller/Ginsberg* test described above.

c. The Statutes Restrict Materials Appellants Distribute.

As described below, the plain language of the Statutes encompasses within their reach materials that appellants have distributed or may distribute to minors or preteens.

Candace Morgan. If Ms. Morgan were to distribute *It's Perfectly Normal* to her eight-year-old grandson, she could be prosecuted under either Section 054 or Section 057.

Under Section 054, that book contains "sexually explicit material" because it contains drawings showing human masturbation and sexual intercourse. ORS 167.051(5) (defining sexual intercourse); *It's Perfectly Normal*, ER 100-104. Ms. Morgan knows that the material is sexually explicit, and she would be furnishing it to her grandson intentionally. ORS 167.054(1).

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[21] Appellants submitted complete copies of all of those works to the district court as exhibits to the Supplemental Declaration of Christopher Finan. (ER 63.) Each of those works is listed in the banned books databases described in note __, *supra*. Excerpts are attached at ER 96 (*Mommy Laid an Egg*), ER 86 (*Brighton Beach Memoirs*); ER 91 (*The Color Purple*); ER 79 (*Ricochet River*); and ER 69 (*Forever*).

Ms. Morgan would likely not be eligible for the exemption in ORS 167.054(2)(b) because that exemption is disjunctive—it would apply only if the "sexually explicit portions [of the book] form merely an incidental part of an otherwise nonoffending whole *and* serve some purpose other than titillation." While the language of the exemption is unclear, it seems likely that *It's Perfectly Normal* would serve "some purpose other than titillation." For example, it has the purpose of educating. It is unlikely, however, that the drawings of intercourse and masturbation could be considered "incidental," no matter what standard was used to make that determination. When educating children about sexual matters, the actual physical actions involved are a key part of the information conveyed.

None of the affirmative defenses in Section 054 would apply to Ms. Morgan.

Similarly, Ms. Morgan also could be prosecuted under Section 057. The same material that is "sexually explicit" for purposes of Section 054 also constitutes a depiction of "sexual conduct" for purposes of Section 057. Ms. Morgan is aware that her grandson could become sexually aroused by viewing such materials; thus she could be prosecuted for providing them to him. As described above, the exemption does not apply to Ms. Morgan; none of the affirmative defenses would apply.

CAP and PPCW. CAP's staff and teen volunteers distribute 'zines containing visual and narrative descriptions of sexual activities to a diverse group

of recipients, including minors and preteens, for the purpose of preventing the spread of HIV. PPCW's staff and volunteers use a number of sex education materials, as described above. The staff and volunteers of both organizations could be prosecuted under either Section 054 or Section 057 for furnishing those materials.

As to Section 054, CAP's 'zines constitute "sexually explicit material." The example provided to the district court contained a picture showing stimulation of the prostate gland, Harmon Decl., Ex. A at 8 (ER 246), which constitutes both human masturbation (ORS 167.051(5)(a)) and penetration (ORS 167.051(5)(c)). The same material constitutes depictions of "sexual conduct" for purposes of Section 057; the descriptions of sexual behaviors throughout also constitute a "narrative account of sexual conduct." ORS 167.051(5), 167.057(1)(a).

The materials used by PPCW also meet those definitions. *It's Perfectly Normal* and *Where Did I Come From?* include pictures of masturbation and/or intercourse. (ER 100-109.) Both books provide narrative accounts of sexual conduct. (*Id*.)

Staff or volunteers who furnish those materials to preteens could be prosecuted under Section 054 simply because they know the material is sexually explicit. Staff or volunteers who furnish those materials to minors could be prosecuted under Section 057 because the materials provide information about how

the recipient could become sexually aroused. Unfortunately, the fact that the materials urge minors and preteens to engage in those activities safely does not change that fact.

CAP and PPCW staff and volunteers would not be subject to the Exemption for the same reason as Ms. Morgan—the explicit portions of the material (or those describing or depicting sexual conduct) are not "incidental" to the rest of the material. As described below in Section F, the additional exemption in ORS 167.054(2)(a) for medical treatment providers does not apply to all of CAP's and PPCW's activities.

CAP's and PPCW's activities are not subject to any of the affirmative defenses under either statutory section. The affirmative defense to Section 054 in ORS 167.054(3)(a) for sex education activities does not apply to all of CAP's and PPCW's activities, particularly their peer education programs, because that exception also requires approval by a parent, guardian, educator, or treatment provider. As described below in Section F, the affirmative defense to Section 057 in ORS 167.057(3)(a) regarding medical treatment providers does not apply to CAP.

ACLU. ACLU's staff and volunteers provide minors access to banned books. Such books include *Mommy Laid an Egg, Or Where Do Babies Come From?* by Babette Cole, *Brighton Beach Memoirs* by Neil Simon, *The Color*

Purple by Alice Walker, *Ricochet River* by Robin Cody, and *Forever* by Judy Blume. Each of those books contains material that violates Section 057.[22] *Mommy Laid an Egg* also violates Section 054 because it contains a drawing of sexual intercourse.

Mommy Laid an Egg is subject to the same analysis described above for other similar works such as *Where Did I Come From?* and *It's Perfectly Normal*. The remaining works are works of fiction each containing some material that violates Section 057.

Under Section 054, ACLU staff and volunteers could be prosecuted simply for "permitting" a preteen to view *Mommy Laid an Egg*, while knowing that it contains a drawing of sexual intercourse. No exceptions apply to ACLU's activities. Under Section 057, ACLU staff and volunteers could be prosecuted for allowing minors to view any of the works above knowing that they could become aroused.[23]

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[22] Excerpts are attached at ER 96-99 (*Mommy Laid an Egg*), ER 86-90 (*Brighton Beach Memoirs*); ER 91-95 (*The Color Purple*); ER 79-85 (*Ricochet River*); and ER 69-78 (*Forever*).

[23] The staff and volunteers might be subject to the Exemption. However, given the vagueness of what the Exemption allows to be criminalized, any prosecutor could determine that, in his or her judgment, the portions of those works that describe or depict sexual conduct are not "merely an incidental part of an otherwise nonoffending whole and serve some purpose other than titillation." See

(continued . . .)

F. The District Court Erred in Finding That PPCW and CAP "Almost Always" Work for Medical Treatment Providers.

1. Preservation.

The district court made its finding regarding this issue in its Opinion and Order. This is appellants' first opportunity to address that finding.

2. The District Court's Factual Error.

In the district court's Opinion and Order, it asserted that "those who work for [PPCW or CAP] are likely protected [against prosecution under Section 057] because their work is almost always going to be on behalf of a medical treatment provider." (ER 29.) There is no evidence in the record to suggest that the PPCW or CAP activities described in this suit take place at the direction of a medical treatment provider. To the extent that statement constituted a finding of fact, it should be overturned as clear error.

VII. CONCLUSION

For the foregoing reasons, appellants request that this Court reverse the district court and grant declaratory relief stating that ORS 167.054 and ORS 167.057(1)(a)(A) are unconstitutional because they violate the First, Fifth,

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(. . . continued)
Section VI.D (vagueness). Because the plain language of the Statutes allows prosecutors to charge ACLU staff and volunteers with a crime for engaging in constitutionally protected activities, it should be struck down as applied to them.

and Fourteenth Amendments to the U.S. Constitution, for all the reasons described herein and in their briefing below.

Appellants also respectfully request that this Court reverse the district court and grant a permanent injunction against enforcement of ORS 167.054 and ORS 167.057(1)(a)(A), or, in the alternative, against enforcement of said sections against plaintiffs and those on whose behalf they sue because the Statutes violate the First, Fifth, and Fourteenth Amendments to the U.S. Constitution, for all the reasons described herein and in their briefing below.

Dated July 17, 2009.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a)(7)(C))

1. This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because this brief contains 8,878 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2007 in 14-point Times New Roman font.

Dated July 17, 2009.

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STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

Powells' Books v. Kroger, Ninth Circuit No. 09-35153, is an appeal by bookstores and trade associations from the same Order from which appellants in this case are appealing. The appellants in *Powells' Books* have distinct and independent interests from appellants in this appeal.

Dated July 17, 2009.

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CERTIFICATE OF SERVICE

United States Court of Appeals Docket Number: No. 09-35154

I hereby certify that I electronically filed the foregoing APPELLANTS' OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 17, 2009.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated July 17, 2009.

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